indicates an opposite intention on the part of Congress. That provision requires notice to attaching entities "[w]henever the owner of a pole, duct, conduit or right-of-way intends to modify or alter such pole, duct, conduit or right-of-way..."[32/] The use of the term "intends" makes clear that modification is to be made whenever the utility's needs require the modification or alteration, rather than compelled by a request for attachment. Had Congress intended otherwise, it would have used language in Section 224(h) to reflect the significant mandatory obligation to make modifications or alterations at the request of a telecommunications carrier or cable television operator that would result from applying the FCC's interpretation of that section.

26. Finally, the Commission must understand the implications of the exercise of powers of eminent domain. In the law governing property rights, the right of eminent domain represents a drastic remedy and one which is not casually exercised by utilities. Utilities do not take their exercise of these powers lightly as the condemnation of property may result in significant disruption to property owners including, in some cases, the displacement of people from their homes. Utilities have a strong interest in maintaining good relationships with the communities and customers that they serve and recognize that the responsible exercise of condemnation power is critical to those relationships. It is contrary to the public interest that such

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[32/] Id. (emphasis supplied).

powers be extended wholesale, though indirectly, to an entirely new class of entity, whether or not permissible as a matter of state law.

27. In summary, an obligation to take independent, affirmative steps to secure new rights-of-way solely for the benefit of a telecommunications carrier is an extraordinary obligation and was neither contemplated nor authorized by Congress. Even assuming, arguendo, that applicable state law permitted a utility to exercise its right of eminent domain on behalf of a third party telecommunications service provider or cable television operator, the Commission should not, as a matter of policy, require the exercise of such radical action on behalf of another entity. The Commission should rescind any requirement that an electric utility exercise its state law-granted powers of eminent domain to expand its infrastructure capacity on behalf of a third party where that capacity is insufficient to permit access.

III. Reconsideration Is Mandated Because the Commission's Decision Is Arbitrary and Capricious

A. The FCC's Requirement that Utilities Provide Access to Infrastructure Within Forty-Five Days Is Arbitrary and Capricious Because the Agency Failed to Provide Notice of Agency Action

28. Newly promulgated Section 1.1403 of the Commission's rules incorporates the duty to provide access to a utility's infrastructure:

> Requests for access to a utility's poles, ducts, conduits or rights-of-way by a telecommunications carrier or cable operator must be in writing. If access is not granted

> within 45 days of the request for access, the utility must confirm the denial in writing by the 45th day. . .[33/]

29. Reconsideration of this section is mandated because the agency failed to address this issue in its NPRM and failed to provide any reasoned basis for the requirement in its First R&O. Thus, the requirement was adopted in violation of the Administrative Procedure Act ("APA").[34/]

30. Pursuant to Section 10 of the APA, a court will set aside agency action found to be "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with the law."[35/] In determining whether agency action is arbitrary and capricious, a reviewing court will first consider whether the agency has considered the relevant factors involved and whether there has been a clear error of judgment.[36/] The agency must articulate a "rational connection between the facts found and the choice made."[37/] A reviewing court "will not supply the basis for the agency's action, but instead rely on the reasons advanced by the

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[33/] 47 C.F.R. § 1.1403. It is unclear from the rule whether the 45-day deadline represents the amount of time in which a utility has to respond to a request for access, or whether it represents the time allowed a utility to grant physical access to its infrastructure. The latter interpretation, as discussed below, imposes significant, unreasonable burdens upon utilities, apart from the procedural irregularities raised by the requirement.

[34/] 5 U.S.C. § 551 et seq.

[35/] 5 U.S.C. § 706(2)(A).

[36/] Citizens to Preserve Overton Park, Inc. v. Volpe, 401 U.S. 402, 416 (1971).

[37/] City of Brookings Mu. Tel Co. v. Federal Communications Comm'n, 822 F.2d 1153, 1165 (D.C. Cir. 1987) (quoting Burlington Truck Lines, Inc. v. United States, 371 U.S. 156, 168 (1962)).

agency in support of the action."[38] The United States Supreme Court has "frequently reiterated that an agency must cogently explain why it has exercised its discretion in a given manner."[39] "[A]n agency action accompanied by an inadequate explanation constitutes arbitrary and capricious conduct."[40]

31. The Commission's adoption of the 45-day access requirement constitutes arbitrary and capricious conduct inasmuch as the Commission failed to provide any basis -- reasoned or otherwise -- for this requirement.[41] Nowhere in the Commission's First R&O does the Commission explain how it devised the 45-day access requirement. The Commission's failure in this regard runs contrary to the APA which requires the agency to supply a reasoned basis for why it adopts a certain rule or rules.[42] The lack of a reasoned basis for the Commission's decision constitutes arbitrary and capricious decision making.[43]

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[38] Cincinnati Bell Tel. Co. v. Federal Communications Comm'n, 69 F.3d 752, 758 (6th Cir. 1995) (citation omitted).

[39] Motor Vehicle Ass'n v. State Farm Mutual Automobile Ins. Co., 463 U.S. 29, 48-49 (1983) (citing Atchison, T. & S.F.R. Co. v. Wichita Bd. of Trade, 412 U.S. 397, 416 (1967)).

[40] FEC v. Rose, 806 F.2d 1081, 1088 (D.C. Cir. 1986).

[41] See 806 F.2d at 1088.

[42] Schurz Communications, Inc. v. Federal Communications Comm'n, 982 F.2d 1043, 1049 (7th Cir. 1994).

[43] Cincinnati Bell Tel. Co. v. Federal Communications Comm'n, 69 F.3d 752 (6th Cir. 1995).

32. Moreover, the Commission's 45-day access requirement is not a "logical outgrowth" out of its original NPRM.[44/] The focus of the "logical outgrowth" test is "whether . . . [the party] . . . should have anticipated that such a requirement might be imposed."[45/] In this instance, parties could not have anticipated that a 45-day access requirement would be imposed, as the Commission did not even address this issue in its NPRM. While the Infrastructure Owners recognize that an agency's notice need not identify every precise proposal that the agency may finally adopt, the notice must specify the terms or substance of the contemplated regulation.[46/] The Commission adopted the 45-day access rule without having discussed this contemplated rule anywhere. Had the Commission addressed the 45-day access requirement in its NPRM, parties would have had an opportunity to respond to the proposal.[47/]

[44/] See United Steelworkers of America v. Marshall, 647 F.2d 1189, 1221 (D.C. Cir. 1980), cert. denied, 453 U.S. 913 (1981).

[45/] Small Refiner Lead Phase-Down Task Force v. United States EPA, 705 F.2d 506, 549 (D.C. Cir. 1983).

[46/] American Medical Ass'n v. United States, 887 F.2d 760, 767 (7th Cir. 1989).

[47/] In short, the Commission failed to provide parties with adequate notice "to afford interested parties a reasonable opportunity to participate in the rule making process." Florida Power & Light Co. v. United States, 846 F.2d 765, 777 (D.C. Cir. 1988). "This requirement serves both (1) 'to reintroduce public participation and fairness to affected parties after governmental authority has been delegated to unrepresentative agencies'; and (2) to assure that the 'agency will have before it the facts and information relevant to a particular administrative problem.'" MCI Telecommunications Corp. v. Federal Communications Comm'n, 57 F.3d 1136, 1141 (D.C. Cir. 1995) (citing National Ass'n of Home

(continued...)

33. Notwithstanding and without prejudice to their assertion that the adoption of the 45-day requirement is procedurally defective, the Infrastructure Owners submit that to the extent the FCC intended to require utilities to grant physical access to infrastructure within 45 days, the requirement is overly burdensome and unreasonable. Forty-five days in which to grant physical access to a utility's infrastructure fails to acknowledge or recognize the amount of internal coordination involved in processing requests for access. Further, it provides a utility with insufficient time to conduct the requisite studies to consider requests to access, for example, studies related to issues of capacity, safety, reliability and generally applicable engineering purposes. Moreover, it is questionable whether a party seeking access can obtain the necessary permits or franchises required before access may be granted within 45 days. Finally, this requirement is at odds with the notice of modifications requirement, that obligates utilities to provide existing attaching entities with 60 days advance notice prior to performing any modifications or alterations to the utility's infrastructure.

34. In the case of one company, simply addressing a request for access to its infrastructure can take six to eight weeks. The process of establishing potential routes, evaluating whether

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47/ (...continued)
Health Agencies v. Schweiker, 690 F.2d 932, 949 (D.C. Cir. 1982)).

the requested route is feasible, creating a final route map, and performing the necessary safety and engineering studies on a case-by-case basis especially when a large number of poles is involved is one that cannot reasonably be accomplished within the 45-day time frame arbitrarily established by the FCC without imposing significant burdens on the utility and its resources. Thus, the 45-day access requirement should be rescinded not only because it was promulgated in violation of the APA but also because of the operational and administrative burdens it would impose on utilities.

B. The Conclusion that Any Type of Equipment Can Be Placed on a Utility's Infrastructure Is Arbitrary and Capricious

35. The FCC erroneously failed to limit the type of telecommunications equipment that may be attached under an interpretation of Section 224 that would afford mandatory access to poles, ducts, conduits or rights-of-way. Specifically, the FCC must clarify that only wire facilities -- coaxial cable and fiber optic facilities -- are covered by Section 224(f). Other types of facilities, including radio antennas, satellite earth stations, microwave dishes and other wireless equipment, are not covered by Section 224(f).[48/]

36. The Pole Attachments Act, as enacted in 1978, was intended to encompass "pole attachments" by cable operators to poles, ducts, conduits and rights-of-way of utilities used, in whole or in part, for wire communications. While the 1996 Act

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[48/] See Reply Comments of Infrastructure Owners at ¶ 14.

expanded the scope of the statute to allow pole attachments by "telecommunications carriers" as well as cable operators, Congress did not make any further changes to the definition of "pole attachment." The placement of any type of equipment other than coaxial and fiber cable, including wireless equipment, on poles, ducts, conduits or rights-of-way raises a number of unique issues that were not intended to be covered by the Pole Attachments Act.

37. The term "pole attachments" in the Pole Attachments Act has referred to the stringing of coaxial cable along a utility's distribution pole system.[49/] Any other type of equipment has not been considered a "pole attachment." Indeed, where any other type of equipment, such as wireless, has been placed on a utility's infrastructure at all, it generally has been sited on communications towers or transmission facilities, which are not covered under Section 224(f) as discussed below. Antennas, for example, require siting on a place higher than the typical distribution pole. Thus, in practical terms, utility poles, ducts, conduits or rights-of-way are unsuited for the placement of anything other than traditional coaxial or fiber cable facilities. Moreover, although wire service facilities typically

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[49/] See, e.g., In the matter of Implementation of Section 19 of the Cable Television Consumer Protection and Competition Act of 1992 Annual Assessment of the Status of Competition in the Market for the Delivery of Video Programming, First Report, 9 F.C.C.R. 7442, 7555 (1994). "Many cable operators lease space on utility poles in order to string wires and deliver programming. The contract between the cable operator and the owner of the pole is known as a 'pole attachment agreement.'"

require distribution pole access to reach customer homes, other types of facilities have a wide range of options in terms of siting, such as buildings, rooftops, communications towers, or water towers.[50/]

38. In spite of the definition of "pole attachment" under the Pole Attachment Act of 1978, Congress did not see fit to alter the definition of a "pole attachment" for purposes of the 1996 amendments to the Pole Attachment Act; neither should the FCC of its own initiative expand that definition. Congress specifically did not include anything other than traditional wire equipment in the definition of "pole attachments."

39. Beyond the definition of "pole attachments," the definition of "utility" establishes that the statute is limited to wire facilities and equipment. Under Section 224(f), both as originally enacted and today, Congress defined a utility as:

> any person who is a local exchange carrier or an electric, gas, water, steam, or other public utility, and who owns or controls poles, ducts, conduits, or other rights-of-way used, in whole or in part, for <u>any wire communications</u>....[51/]

The use of "wire communications" was in fact retained from the previous definition of utility; Congress considered such language and deliberately decided not to change it. Since, for purposes of the Act, a "utility" is a person utilizing poles, ducts,

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[50/] Unlike the "push" Congress gave the cable television industry, Congress did not see a need to grant access by cellular telephone companies to poles, ducts, conduits or rights-of-way because wireless facilities can be place in many different locations.

[51/] 47 U.S.C. § 224(a)(1) (emphasis added).

conduits or rights-of-way "for any wire communication," the access provision necessarily should be construed to apply only to such uses. Had Congress intended otherwise, knowing of the historical interpretation of the Act as applicable only to wire communications, it would have amended the statute to reflect an intent that the Act also apply to wireless uses.[52/]

40. The Pole Attachments Act covers only the attachment of wire equipment -- coaxial and fiber cable -- to utilities' poles, ducts, conduits or rights-of-way. There is nothing in the express language of the statute, its legislative history or the case law to support a contrary view. Thus, the Commission must rescind its finding on this issue.

C. The Commission's Determination that a Utility May Not Restrict Who Will Work in Proximity to Its Electric Lines Is Arbitrary and Capricious and Reflects a Failure to Comprehend Fully the Danger Associated With Such Work

41. In addressing the question of whether a utility can impose limitations on the class of workers that work in proximity to a utility's facility, the Commission determined that:

> [a] utility may require that individuals who will work in the proximity of electric lines have the same qualifications, in terms of training, as the utility's own workers, but the party seeking access will be able to use any individual workers who meet these criteria. Allowing a utility to dictate that only specific employees or contractors be used would impede the access that Congress

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[52/] The Commission has an obligation to construe the language of Section 224(f) as narrowly as possible given the constitutional taking implications of Section 224(f). See, e.g., Delaware, Lackawanna, & W. R.R. Co. v. Morristown, 276 U.S. 182, 192. "[T]he taking of private property for public use is deemed to be against the common right and authority so to do must be clearly expressed."

> sought to bestow on telecommunications providers and cable operators and would inevitably lead to disputes over rates to be paid to the workers.

In its effort to apply a uniform rule to all utilities and all types of infrastructure, the Commission has adopted a rule which ignores fundamental and significant differences between working in proximity to electric facilities and working in proximity to other telecommunication facilities.

42. Electric facilities are used for high voltage transmission and, thus, pose a real and significant danger to anyone working in close proximity to such facilities. To minimize the risk of harm to persons and property, utilities tap a pool of highly trained and experienced employees to perform any required work on such facilities. The level of experience required of an employee called upon to perform work on electric facilities is strictly related to the grade of danger associated with the work. For example, any employee who works in proximity to electric facilities in conduits may be required to have a minimum of ten years of experience. Qualified personnel require a unique understanding of the dangers associated with the performance of construction, maintenance or repair work in proximity to electrical wire. Personnel possessing the requisite skill and experience for certain situations are in short supply. Because of the hazards involved, a utility is understandably reluctant to allow a person with unknown skills to perform highly dangerous work. Only a person with a thorough knowledge of the

utility's specific operations and facilities can safely perform some types of construction, maintenance and repair work.

43. In complete disregard of the serious danger and concomitant liability associated with working in proximity to electric facilities, the Commission has fashioned a rule that simply is unworkable on a practical level. Most importantly, regardless of any broad form indemnity provision, electric utilities simply cannot sufficiently protect themselves from personal injury litigation and the high costs associated with an electrical outage when accidents occur as a result of work being performed by inadequately skilled or trained workers. Because of this enormous financial exposure to utilities and their ratepayers, it is incongruous that the Commission can first mandate access to this dangerous facility, and then eliminate the electric utility's ability to take certain measures to minimize the risk and liability this mandatory access may cause. The Commission's rule on worker access to utility infrastructure is unsupported by the statutory provisions relating to nondiscriminatory access and, thus, is capricious. For this reason, the rule must be rescinded to allow the utility, in the exercise of its best judgment, to adopt procedures that it deems are necessary to protect itself, persons requesting access to its infrastructure and the public in general from the dangers associated with exposure to high voltage electric lines. The utility must be allowed to dictate that, in some instances, only

its specifically trained and experienced personnel may access its infrastructure.

D. The Commission Improperly Incorporated Section 224(i) into Its Section 224(h) Analysis on Cost-Sharing Issues

44. In the First R&O, the Commission extensively discussed modification costs in its analysis of cost-sharing under Section 224(h), the newly enacted written notification provision. While that provision mentions modifications, the only costs addressed in Section 224(h) are accessibility costs. Modification costs are not involved. Confusingly then, the Commission adopted a rule addressing modification costs under the rulemaking notice to implement Section 224(h).[53/]

45. Clearly, the Commission has misread Section 224(h). That section reads:

> Any entity that adds to or modifies its existing attachment after such notification shall bear a proportionate share of

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[53/] That rule paraphrases or adopts verbatim the language of Section 224(i). Section 224(i) states:

> An entity that obtains an attachment to a pole, conduit, or right-of-way shall not be required to bear any of the costs of rearranging or replacing its attachment, if such rearrangement or replacement is required as a result of an additional attachment or the modification of an existing attachment sought by any other entity ... .

The Commission's rule, in turn, reads:

> ... a party with a preexisting attachment to a pole, conduct, duct or right-of-way shall not be required to bear any of the costs of rearranging or replacing its attachment if such rearrangement or replacement is necessitated solely as a result of an additional attachment of the modification of an existing attachment sought by another party. 47 C.F.R. § 1.1416.

> the costs incurred by the owner in making such pole, duct, conduit, or right of way accessible.[54/]

As the quoted passage established, Section 224(h) says nothing about modification, rearrangement, replacement, or make-ready costs. A discussion of modification or alteration costs is appropriate in the context of a rulemaking to implement Section 224(i) of the Pole Attachments Act. However, Section 224(i) is not a subject of this proceeding.[55/]

46. Congress did not intend for modification costs to be governed by Section 224(h). Yet, the Commission's new rule, 47 C.F.R. § 1.1416, does just that. Because the Commission has improperly adopted rules implementing Section 224(i) under the guise of Section 224(h), it must strike 47 C.F.R. § 1.1416 as beyond the scope of this rule making. Any rule implementing Section 224(h) must address only the costs of accessibility, as specifically set forth by Congress in express language of that statutory provision.

[54/] 47 U.S.C. § 224(h) (emphasis added).

[55/] First R&O, ¶ 1201, n.2952 "Note that section 224(i) was not the subject of the Notice."

IV. The FCC's Interpretation Is Impermissible Because It Violates Congressional Intent

A. The Requirement for Uniform Application of the Rates, Terms and Conditions of Access Is Contrary to Law Because It Fails to Give Effect to the Statutory Requirement of Voluntary Negotiations

47. Section 224(e)(1) of the 1996 Act provides for voluntary negotiations whereby a utility and a telecommunications carrier may negotiate and enter into a binding agreement for access to the utility's infrastructure on terms that best suit the particular circumstances of both parties. Specifically, Section 224(e)(1) states that the Commission will prescribe regulations:

> to govern the charges for pole attachments used by telecommunications carriers to provide telecommunications services, when the parties fail to resolve a dispute over such charges."[56/]

48. Clearly, Congress intended for utilities and requesting telecommunications carriers to voluntarily enter into binding, contractual arrangements. Congressional intent encouraging negotiated agreements, including negotiated rates, is clearly evidenced by the House/Senate Conference Committee's report explaining the 1996 Act and the amendments to the Pole Attachments Act enacted thereunder. That report states:

> The conference agreement amends section 224 of the Communications Act by adding new subsection (e)(1) to allow parties to negotiate the rates, terms, and conditions for attaching to poles, ducts, conduits, and rights-of-way owned or controlled by utilities. . .[57/]

56/ 47 U.S.C. § 224(e)(1) (emphasis added).

57/ H.R. Conf. Rep. No. 458, 104th Cong., 2d Sess. 207 (1996) (emphasis added).

49. The concept behind negotiated agreements also comports with the public policies underlying the 1996 Act. The 1996 Act is intended "to provide for a pro-competitive, deregulatory national policy framework . . . by opening all telecommunications markets to competition."[58/] Even where Congress recognized that some regulation might be warranted during the transition period from a regulated to a deregulated market place, it put in place procedures to reduce or eliminate that regulation where possible.[59/]

50. In its First R&O, the Commission recognized the deregulatory, pro-competition approach of the 1996 Act. For example, the Commission declared that it would enact rules and guidelines that are intended to "facilitate the negotiation and mutual performance of fair, pro-competitive access agreements." First R&O, at 1143.

51. Conflicting with Congress's notion of voluntary negotiated agreements, however, the Commission enacted a specific "rule" in its First R&O that states:

> . . . where access is mandated, the rates, terms and conditions of access must be uniformly applied to all telecommunications carriers and cable operators that have or seek access. Except as specifically provided herein, the utility must charge all parties an

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58/ H.R. Conf. Rep. No. 458, 104 Cong., 2d Sess. 113 (1996).

59/ See, e.g., 47 U.S.C. § 252(a)(1) (providing that an incumbent local exchange carrier and a party requesting interconnection may enter into a binding agreement without regard to the interconnection standards set forth in Sections 251(b) and (c)).

> attachment rate that does not exceed the maximum amount permitted by formula we have devised for such use . . .[60/]

52. Interpreted as a separate section, this Commission rule cuts across Congress's intent, in promulgating Section 224(e)(1) of the 1996 Act, that there be voluntarily negotiated agreements. If rates, terms and conditions of access must be uniformly applied to all telecommunications carriers and cable operators that have or seek access, there is no reason to enter into voluntary negotiations with other carriers.

53. In interpreting a statute, agencies and courts must look to a construction that gives effect to the statute as a whole.[61/] A construction that renders meaningless one or more provisions of the statute must be avoided, as " . . . it is well settled that, in interpreting a statute, the court will not look merely to a particular clause in which general words may be used, but will take in connection with it the whole statute . . and the objects and policy of the law . . ." [62/]

54. In the present context, the Commission's decision that the statute requires uniform application of rates, terms and conditions for access ignores the 1996 Act's statutory provision allowing parties to negotiate their own terms. For this reason, the agency must correct this clear error by adopting regulations

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[60/] First R&O, ¶ 1156 (emphasis added).

[61/] United States v. PUC of District of Columbia et al., 151 F.2d 609, 613 (1945).

[62/] Stafford v. Briggs, 444 U.S. 527, 535 (1980) (quoting Brown v. Duchesne, 60 U.S. (19 How.) 183, 194 (1857)) (emphasis added).

that will enable parties to negotiate the rates, terms and conditions of their agreements.

B. The FCC's Finding that the Pole Attachments Act Applies to Transmission Facilities Is Contrary to the Plain Meaning of the Statute and the Congressional Intent

55. In the First R&O, the Commission suggested that transmission facilities might be covered by the Pole Attachments Act and declined to make a blanket determination that Congress did not intend to include such facilities under Section 224(f)(1).[63/] That suggestion contradicts the plain meaning of the statute and the legislative history of the Pole Attachments Act, as amended, both of which clearly establish that Congress did not intend for transmission facilities to be included under Section 224(f).

56. The Pole Attachments Act was enacted to provide the then nascent cable television industry with access to the distribution poles of utilities, in an effort to foster the development of the CATV industry. Cable providers asserted that they required access to distribution poles in order to wire customer homes. Congress intended access to be limited to distribution poles; its intentions did not change under the 1996 Act. To the contrary, had Congress intended to mandate nondiscriminatory access of transmission facilities, it would have specifically included "transmission facilities" in the precise language it used.

63/ First R&O, ¶ 1184.

57. The meaning of a statute must first be sought in the language in which the act is framed.[64/] If that language is plain, then there is no room for alternative construction.[65/] Moreover, the expression of a discrete group of items creates an inference that all omissions are meant to be excluded.[66/]

58. Based on its plain language, the Pole Attachments Act encompasses only "poles, ducts, conduits, and rights-of-way."[67/] Congress did not name, and thus did not intend to include, transmission facilities in the scope of the infrastructure covered by Section 224(f).

59. As noted above, the 1996 Act's amendments did not change the type of utility infrastructure covered by the original 1978 Act. For this reason, it is appropriate to look not only to the 1996 Act's legislative history to glean Congressional intent, but also to that of the earlier statute.[68/] For example, the legislative history of the 1978 Pole Attachments Act notes that the FCC's jurisdiction over pole attachments is triggered only

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64/ Wolverine Power Co. v. FERC, 963 F.2d 446, 449-450 (D.C. Cir. 1992).

65/ Id.

66/ See Nat'l Resources Defense Council v. Reilly, Adm'r, EPA and EPA, 976 F.2d 36, 41 (D.C. Circ. 1992).

67/ Additionally, words not defined in a statute should be given their ordinary or common meaning. United States v. PUC of District of Columbia et al., 151 F.2d 609, 613 (D.C. Cir. 1945). The Infrastructure Owners are unaware of any instance in which Congress has included transmission facilities in the definition of poles, ducts, conduits and rights-of-way.

68/ See generally, Blum v. Stenson, 465 U.S. 886, 896 (1984).

where space on a utility pole has been designated and is actually being used for communications services by wire or cable.[69/] Thus, transmission poles, which are not used for stringing communications wires, would not be subject to FCC jurisdiction and logically are not within the scope of the Act.[70/]

60. Moreover, in its Reconsideration Memorandum Opinion and Order revising the 1978 rate formula, the Commission stated that "[t]he cable television industry leases space on existing distribution poles owned by electric utilities and telephone companies to attach its coaxial cable and related equipment."[71/] Additionally, in at least two other decisions addressing FCC rate calculations, the Commission states that "towers and extremely tall poles" are pole plants not normally used for attachments.[72/] These references are clear examples of the Commission's interpretation that, as the plain language of the statute suggests, the Pole Attachments Act does not apply to transmission towers and other transmission facilities. This interpretation is consistent with the prevailing understanding

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[69/] S. Rep. No. 95-580 at 15, reprinted in 1978 U.S.C.C.A.N. 109, 123.

[70/] Id. at 123-124.

[71/] See In the Matter of Amendment of Rules and Policies Governing the Attachment of Cable Television Hardware to Utility Poles, 4 F.C.C.R. 468 (1989) (emphasis added).

[72/] In the Matter of Capital Cities Cable, Inc. v. Mountain States Tel. and Tel. Co., 56 Rad. Reg. 2d (P&F) 393, 399 n.10 (1984); In the Matter of Logan Cablevision, Inc. v. Chesapeake and Potomac Tel. Co. of West Virginia, 1984 FCC Lexis 2400 (1984).

within the electric utility industry that the term "poles" means distribution poles only. Accordingly, the Commission should correct its finding on the issue and specifically interpret the Pole Attachments Act to exclude transmission facilities.

C. The FCC Violated the Plain Language of the Pole Attachments Act to the Extent It Concluded that the Use of any Single Piece of Infrastructure for Wire Communications Triggers Access to All Other Infrastructure

61. In its First R&O, the FCC discusses the issue of when the mandatory access provision of Section 224(f) is triggered. According to the Commission, the definition of "utility" addresses that issue.[73/] A "utility" -- a local exchange carrier or an electric, gas, water, steam or other public utility who owns or controls poles, ducts, conduits or rights-of-way -- must grant access if those poles, ducts, conduits or rights-of-way, are "used, in whole or in part, for wire communications."[74/] The question then becomes the proper interpretation of the phrase "used, in whole or in part, for wire communications." The Commission made three critical findings in this regard.

62. First, the Commission determined that the plain language of the statute establishes that a "utility" may deny access to its facilities if the utility has refused to permit any wire communications use of its facilities and rights-of-way.[75/]

[73/] First R&O, ¶s 1171-1174.

[74/] Id., ¶ 1172.

[75/] First R&O, ¶ 1173.

Second, the Commission found that "the use of any utility pole, duct, conduit or right-of-way for wire communications triggers access to all poles, ducts, conduits and rights-of-way owned or controlled by the utility, including those that are not currently used for wire communications."[76/] Third, the Commission found that the use of poles, ducts, conduit and rights-of-way for a utility's private internal communications constitute "wire communications," thereby triggering the access requirement.[77/] These findings violate the Congressional intent of the Pole Attachments Act and, for this reason, are impermissible constructions of the statute.

63. The Commission relies on the use of the phrase "in whole or in part" to support its conclusions. According to the Commission, that phrase demonstrates that Congress did not intend for a utility to be able to restrict access to the exact path used by the utility for wire communication.[78/] The Infrastructure Owners disagree.

64. Congress has addressed the precise question of whether the phrase "in whole or in part" refers to (1) the use of an individual pole, in whole or in part, or (2) to the use of a utility's entire electric distribution network, in whole or in part, for wire communications. Although not addressed in the legislative history of the 1996 Act's amendments, Congress spoke

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[76/] Id.

[77/] Id., ¶ 1174.

[78/] Id., ¶ 1173.

to the question in 1977, in enacting the original Pole Attachments Act.[79] There, Congress indicated two conditions precedent to Commission jurisdiction over pole attachments:

(1) That communications space be designated on the pole; and,

(2) That a CATV system use the communications space, either alone or in conjunction with another communications entity.[80]

65. This language establishes that Congress intended the Commission's jurisdiction to be invoked on a pole-by-pole basis, not a systemwide basis. Plainly then, the phrase "used, in whole or in part" refers to the use of a single pole.

66. This interpretation of the statutory language is consistent with the underlying nature of access requests. Those requests are made on a specific route or segment basis, depending on the needs of the requesting party. Similarly, the decision as to whether access may be granted consistent with existing capacity, safety, reliability and generally applicable engineering purposes is made on a pole-by-pole basis. Even the statutory rate methodology recognizes variations among poles -- in terms of the number of attaching parties, the space occupied

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[79] Because the language in question was not amended by the 1996 Act's amendments, the earlier legislative history is relevant in determining the intent of Congress.

[80] S. Rep. No. 95-580, 95th Cong., 1st Sess. 16 (1977) (emphasis added); In the Matter of Adoption of Rules for the Regulation of Cable Television Pole Attachments, 68 F.C.C.2d 1585, 1588 (1977).

by each, and, to a certain extent, the nature of the services offered over the attachments. In short, a pole-by-pole assessment of whether nondiscriminatory access is triggered because the pole, duct, conduit or right-of-way is being used for "wire communications" is fully consistent with the Congressional intent, as embodied in the legislative history of the statute.

67. The Commission's construction of the phrase "used, in whole or in part, for wire communications" leads it to an 'access to one, access to all' notion. The Infrastructure Owners request clarification, however, that the Commission has not found, in its First R&O, that the use of one pole for "wire communications" triggers access to ducts and conduits that are not now, and never have been, used for wire communications. To the extent the Commission has reached such a conclusion, the Infrastructure Owners seek reconsideration of that finding.

68. The Commission has acknowledged the unique properties and safety considerations associated with conduits and ducts,[81/] in light of which, many electric utilities have declined to permit access to these facilities on a blanket, nondiscriminatory basis to any third party. Thus, the utility maintains strict control over the access and use of its infrastructure, all of which is intended to be used to carry high voltage, dangerous electric wires and related equipment. The Commission has acknowledged that "denial of access to all discriminates against

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[81/] First R&O, ¶ 1149 ("The installation and maintenance of underground facilities raise distinct safety and reliability concerns.").

none."[82] This principle must be applied on an infrastructure- and even route- or segment-specific basis.

69. Finally, the Commission's conclusion that the "wire communications" used solely for internal purposes in providing electric service triggers the access requirement is unsupported by any legal authority. "Wire communications," as used in this context, clearly contemplates common carrier communications by telecommunications carriers and cable service operators -- not communications by wholly private carriers and private networks. Thus, as noted above, the FCC's jurisdiction under the Pole Attachments Act is not even triggered unless the utility has designated communications space on a pole and a CATV system or telecommunications carrier uses the communications space, either alone or in conjunction with another communications entity.[83] A utility using a private network to support its electric operations is not a communications entity. It is not considered to make or have "pole attachments" under the statute.[84] It is not required by the statute to impute to itself the costs of "pole attachments" unless it engages in the provision of

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[82] First R&O, ¶ 1173.

[83] S. Rep. No. 95-580, 95th Cong., 1st Sess. 16 (1977) (emphasis added); In the Matter of Adoption of Rules for the Regulation of Cable Television Pole Attachments, 68 F.C.C.2d 1585, 1588 (1977).

[84] "Pole attachments" are defined as "any attachment by a cable television system or provider of telecommunications service to a pole, duct, conduit, or right-of-way owned or controlled by a utility." 47 U.S.C. § 224(a)(4).